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In the Supreme Court of the United States

OCTOBER TERM 1941.

No. 126.

FIXLER BROS., INC.,
Petitioner,

vs.

THE AUTOMOBILE INSURANCE COMPANY
OF HARTFORD, CONNECTICUT,
Respondent.

RESPONDENT'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI.

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THE CASE.

Petitioner recovered a default judgment against Gregg Carloading and Distributing Company and brought this suit upon a policy of motor truck merchandise insurance issued to Gregg Carloading and Distributing Company by the respondent. The policy of insurance (R. 5, 6) provided:

> "8. It is warranted by the assured that each tractor and trailer combination outfit operated in the assured's business and covered under this policy shall at all times be in the custody of two men when cargo is in transportation between points of shipment and destination except upon the following runs: (None of which are involved here.)
>
> "9. It is warranted by the assured that in no event shall cargo being transported by any truck or tractor and trailer combination be left unattended while in transit except when garaged in a substantial building, such building to be properly attended in a manner which would reasonably safeguard such cargo against the risk of theft."

The tractor and trailer combination in the sole custody of the operator was taken from the dock of Gregg Carloading and Distributing Company, a common carrier, in New York City, while loaded with merchandise consigned to the petitioner in Chicago, Illinois, to a parking lot in the city of New York. There was no one on the truck after the driver left it in the open parking lot where it remained during the night. There was one attendant in the parking lot during this period when it was stolen.

Petitioner in the trial court recovered judgment for the amount of the default judgment obtained against the carrier. The reviewing court (117 F. (2d) 979) reversed because (R. p. 31):

> "The obvious purpose of Clause Nine, supplementing the custody provision of the preceding Clause Eight, was to require that at least one of the two men into whose custody the combination outfit hauling the cargo was placed should remain during its transit with the cargo, unless 'garaged' or placed in a substantial building safeguarded in a reasonably prudent manner against the risk of theft. * * *
>
> "This breach by the assured company of the warranty contained in Clause 9 of the policy bars recovery by appellee against the appellant insurer of the amount of the judgment obtained by appellee against the Gregg Carloading and Distributing Company in the state court."

No application for rehearing was made in the Circuit Court of Appeals. Petitioner presents here his petition for certiorari.

It should be denied.

ARGUMENT.

I.

THE LANGUAGE OF THE INSURANCE POLICY IS SUSCEPTIBLE OF BUT ONE MEANING.

1. The tractor and trailer combination was left unattended while in transit.

Paragraph 9 of the policy of insurance provides that cargo shall not be left unattended while in transit. The driver of the truck was the only witness in this case. Counsel for petitioner erroneously state that the uncontradicted testimony is that attendants were at all times present while the tractor and trailer was in the parking lot during the night in question. We quote from the opinion of the Circuit Court of Appeals (R. p. 31):

> "The witness admitted that he was alone when he parked the truck around six-thirty in the evening; that when he got off, there was no one 'at all' on the truck; and that there was only one attendant, 'a colored fellow,' on the parking lot during the night to look after some twenty trucks and several passenger automobiles."

2. The language of the insurance policy was found to be plain and unambiguous.

The reasoning of the Circuit Court of Appeals concerning the plain meaning of Paragraphs 8 and 9 of the insurance policy is found in the opinion of that Court (R. p. 31):

> "Read together, the careful language of the two clauses, eight and nine, points unambiguously to this conclusion, rather than to an assumption that the insurer intended to permit both custodians of the cargo to divest themselves of responsibility for its care by delegating their delegated duty to Tom, Dick, or Harry."

3. The rights of the petitioner are no greater than the rights of the assured.

The petitioner argues that the principles of construction of an insurance contract are much more applicable to a shipper of cargo on a motor truck than they would be to the carrier to whom the policy of insurance was issued. If the terms of an insurance policy be breached by the assured, the rights of a judgment creditor claiming through the assured are no better than the rights of the assured. *Conold v. Stern,* 138 O. S. 352 (1941). This doctrine was enunciated by the Circuit Court of Appeals (R. p. 32) wherein it referred to a previous decision by it,—*Storer vs. Ocean Accident & Guarantee Corp.,* 80 F. (2d) 470 (1935), the pertinent language of which reads as follows:

> "Injured party suing automobile liability insurer after recovering judgment against insured and failing to have it satisfied, had no higher right to enforce policy after insured's breach of condition of cooperation than insured if he were seeking indemnity."

II.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS NOT IN CONFLICT WITH THE LAW OF OHIO.

Petitioner seeks the writ on the ground that the decision is in conflict with the law of the State of Ohio. The decision is in fact in exact accord with the law of the State of Ohio. One would suppose that in a state where the law is that "insurance policies, like other written contracts, mean what they say and all they say," for "if such contracts are not to be enforced as written, they might as well not be written at all," *National Life & Accident Insurance Co. vs. Ray,* 117 O. S. 13, 22 (1927); 158 N. E. 179, the petitioner would not argue that the opinion of the Circuit Court of Appeals is in conflict with the law of the state. We again quote from the opinion of the Circuit Court of Appeals (R. p. 31):

"Read together, the careful language of the two clauses, eight and nine, points unambiguously to this conclusion, rather than to an assumption that the insurer intended to permit both custodians of the cargo to divest themselves of responsibility for its care by delegating their delegated duty to Tom, Dick, or Harry."

Other cases announcing the law of Ohio are *Rose vs. New York Life Insurance Co.*, 127 O. S. 265 (1933), wherein it is said (pp. 272-3):

"But we may not read a meaning into the clear language of the contract and then find ambiguity in the words which deny that meaning. * * * When the meaning of a contract can be fully and clearly ascertained from its own words, we are at liberty to go no further in search of aid in its interpretation."

And the case of *Burns vs. Employers' Liability Assurance Corp.*, 134 O. S. 222 (1938):

"However, if there is no ambiguity in the policy, there is no occasion to resort to the rule. Undoubtedly the insured is entitled to a liberal construction, but not to such a construction as would include matters which were never conceivably intended to be covered by the parties.

"We feel that the true rule of construction was set forth in *New Amsterdam Casualty Co. v. Johnson, Admx.*, 91 Ohio St., 155, 157, 110 N. E., 475, L. R. A. 1916B, 1018:

" 'In construing the language of an insurance policy it has been universally and properly held that the words of limitation should be most favorably construed in behalf of the insured and against the company.

" 'This does not mean, however, that a strained, unnatural and forced meaning should be given words or phrases, but rather the everyday meaning which must have been plainly in the minds of the contracting parties.' "

The authorities relied on by the petitioner are not controlling in view of the foregoing.

Clearly, therefore, the local rule is exactly that which the Circuit Court of Appeals here applied.

CONCLUSION.

It follows, therefore, that the petition for certiorari should be denied because the conclusion reached by the court below is not only right, but in exact accord with the law of the state.

Respectfully submitted,

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Sheldon S. Reynolds,
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Counsel for Respondent.